DCPI 517/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 517 OF 2008

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BETWEEN

SHAH JUNAID ALI Plaintiff

and

YAU LEE GALVANIZERS

(HOT-DIP) COMPANY LIMITED Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung in court

Date of hearing: 7-8; 13-14 January 2009

Date of judgment: 14 April 2009

**JUDGMENT**

1. Ali, the Plaintiff, injured his left middle finger when opening the sliding door of the workshop of Yau Lee, the Defendant, in the course of work on 3 October 2005. For his injury, Ali claims damages. Yau Lee disputes both the liability and quantum of damages claimed.

**THE ACCIDENT**

1. Ali came to Hong Kong from Pakistan when he was 22 years old. At the time of the accident, he was 28 years old. Yau Lee was a galvanising company with 2 factory premises: Nos. 446 and 454 on the same road at Hung Shui kiu, Yuen Long. By the time of the accident, Ali had been working as a general labourer under the employ of Yau Lee for about 6 months. Ali basically did whatever that was assigned to him.
2. In the afternoon in question, Chan, factory manager of Yau Lee, instructed Ali, then working in No.446, to drive the factory truck to pick up treated metal products from No.454. A section of No.454 was a workshop where metals were treated by dipping into a molten zinc bath – the hot-dip section as it was called during the trial.
3. No.454 had a large metal sliding door. Photographs of the sliding door were produced. The door was made of 3 parts which moved along some tracks above. There was an outside vertical handle bar on the first part to the left. There was no handle bar on the inside of the door. To open the door from the outside, one might slide the first part of the door sideway to the right. It would slide on top of and overlap with the next part. Ali was supposed to reverse the truck into the workshop for loading after the sliding door was opened.
4. Ali drove the truck to No.454. Ali came out of the truck and opened the sliding door himself. He held the vertical handle bar and slid the first part of the door partly open. He then stood into the gap so made, facing the edge of the door with the left side of his body inside and the right side of his body outside. With his left hand on the inside of the door and his right hand on the outside handle bar, he pushed the door forward. In the course of that, his left middle finger was caught between the first and the second parts of the inside of the door. The door then jerked and moved backwards on itself and thus releasing his finger.
5. I find the above to be the facts.

**THE WITNESSES**

1. Ali gave evidence (in Punjabi). The factory manager of Yau Lee, Chan, also gave evidence. Before the trial began, Yau Lee introduced another witness, Yan, who was the designated driver of the truck in question whom Ali was assigned to replace that afternoon.

**DUTIES**

1. Yau Lee is said to have been in breach of the following duties:
   1. duty not to be negligent;
   2. duty as occupier;
   3. implied contractual duty of employer; and
   4. statutory duty under the Occupational Safety and Health Ordinance and Regulations, Cap.509.
2. The existence of the duties under (1) to (3) above is not controversial. At one point, I questioned whether the opening and closing of the door amounted to handling of load for the purpose of the pleaded statutory duty. Miss Lau apparently did not really dispute the applicability of the statutory provisions. For reasons that would become apparent from the discussion below, I would also answer my question in the affirmative.

**WHETHER BREACH**

1. Miss Lau referred to *Cheung Suk Wai v AG* [1996] 4 HKC 288, *Ng Kong v Golden Caterers Ltd*, HCPI 206/2004 and *Lam Ka Lok Louis v Swire Properties Management Ltd*, HCPI 914/2003. She submitted that Ali’s work at the time was very simple, i.e., opening the door and reversing the truck into the workshop to collect the goods. As far the suggestion was that this required no specific instruction or training from Yau Lee, I disagree for the following reasons.
2. The sliding door was not merely for access to and egress from the workshop. Actually for exit purpose, there were adjacent to the door 2 other exits with roller shutters, one operated manually and one by pressing a button. They could be seen from the photographs.
3. The evidence was that due to the risk of hot splash during the dipping process, alarm would be sounded before each dipping was carried out. The 2 workers assigned to work in the hot-dip section would have to vacate from the section, close the sliding door and stayed outside until the process was over. After the process was over, the door would often be opened to allow the heat generated by the process to cool down particularly during summer and stuffy weather.
4. This open-and-close routine happened practically tens of times during the day. Of course, the sliding door was also where the truck was supposed to move in and out of the workshop for loading and unloading purposes. Practically, handling the sliding door had become part of the system of work there.
5. I have no doubt that the sliding door was heavy. Judging from the evidence including the photograph depicting the posture of the person demonstrating how to close the door by holding the outside handle bar (p.303 of the bundle), I believe that certain amount of force was required. Regarding this, 60-year-old Yan seemed to be the only witness who somehow suggested that the door was not heavy (to him). While I would not say that the door was so heavy that one person would be *physically* incapable of handling (as Ali suggested), Yan’ s evidence is hardly believable.
6. I find that the system of work at No.454 did necessitate the provision of proper and adequate instruction as to *when* and *how* to open and to close the sliding door at work. The key issue in the present case is of course not when but *how* to do this.
7. Yau Lee’s case is that Chan had demonstrated to Ali how to handle the sliding door. Miss Lau submitted that Ali was the author of his own accident for the following reasons:
   1. Ali failed to follow completely or at all Chan’s instruction as to how to open the door.
   2. He adopted a dangerous way to open the door.
   3. He failed to pay sufficient care as he pushed the door.

**Had Chan instructed Ali how to open and to close the sliding door?**

1. By his statement, Chan gave the impression that Ali had the experience of operating the sliding door at No.454 for 4 to 5 months prior to the accident. In court, he agreed that Ali started working at No. 454 for only a short period of time before he was assigned to work mainly at No.446. This matched what Ali said. According to Ali, he was sent to work at No.454 only once or twice a week since then.
2. Contrary to his statement that he had instructed all the workers how to handle the sliding door, Chan said in court that he had told the 2 workers assigned to work at the hot-dip section how to handle the door. He believed he had verbally instructed Yan too. He said he had demonstrated to Ali as Ali knew little Cantonese.
3. Ali maintained that he had not been instructed how to open or to close the sliding door. He had not opened the door himself prior to the accident. He had not helped Yan open the door when Yan drove the truck there. But he had seen the 2 workers working at the hot-dip section open the door.
4. Chan did not deny that the 2 workers assigned to work at the hot-dip section would open and close the door of the workshop. But he said the driver of the truck also did that. That included Yan and occasionally Ali when he drove the truck when Yan was on leave. Contrary to that, Yan agreed that during the period when Ali worked there prior to the accident, Yan had never taken any leave from work.
5. Miss Lau submitted that it defies logic for the truck driver to just wait for the door at No.454 to be opened, as the 2 workers at the hot-dip section might be busy. But according to Yan, the 2 workers in fact helped him so that he did not often have to open the door himself. In any event, Ali said he never helped open the door or asked other workers to do so because he had his own work to do. Seeing him give evidence, I do not doubt that Ali tended to mind his own business, unless otherwise instructed by his superior.
6. Apparently, that was what happened in that afternoon. According to Ali, after arriving at No.454, he remained in the truck waiting for the workers inside the workshop to open the sliding door. Chan was then standing near the exit adjacent to the sliding door. It was only when Chan shouted at him asking him to come out of the truck to open the sliding door did Ali do so. Chan gave evidence to the similar effect.
7. It should be borne in mind that this was not the first trip of Ali there in that afternoon. According to Ali, he had already made 1 or 2 similar trips to No.454 by then in that afternoon. I accept such evidence. If Ali should expect no one to open the door for him and he had previously opened the door himself as Chan alleged, it would be strange for Ali to remain in the truck after arriving at No.454 this time. Likewise, Chan should not have found it necessary to shout at Ali to ask him to come out of the truck to open the door himself this time.
8. On the issue of whether Ali had been instructed how to handle the sliding door and whether he had opened the door himself prior to the accident, I prefer the evidence of Ali to that of Chan and Yan.

**Did Ali choose to deviate from the safe and proper way to open the sliding door?**

1. Miss Lau referred to the way Ali began to open the door which was exactly the way it should be. She submitted that *therefore* Ali knew full well how the door could be opened safely and properly and it was he who decided to deviate from this safe and proper way.
2. Miss Pinto questioned the logic of this argument. In any event, this argument cannot stand in view of my finding that Ali should not be left to figure out for himself the safe and proper way to open the door and that Yau Lee had failed to provide the necessary instruction.

**Was the accident the result of Chan’s failure to pay attention to his own safety?**

1. It was argued that even by opening the door the way Ali did, the accident would not have happened if Ali had paid attention to his own safety, particularly the position of his finger and the gap between the 2 parts of the sliding door.
2. Ali said he could not see the gap between the 2 parts of the sliding door from where he stood before pushing the edge of the sliding door forward. He admitted that he did not check whether his finger might be trapped by the gap.
3. How to position the hand on the inside of the door might be one consideration. But it was how the door moved which Ali did not expect. According to Ali, the door upon being pushed moved so quickly that this took him by surprise. His finger was caught as a result. I accept such evidence.
4. According to Chan, the door had been in use for years before the accident. Notwithstanding that, it apparently never occurred to Chan that he had to assess such risk of quick movement of the door when being opened or any risk of any part of the body of the worker getting trapped as a result. Ali could not be reasonably expected to perceive how to exercise control over the speed and the movement of the sliding door, when he had not been instructed how to handle it in the first place.
5. Chan also gave evidence as to the maintenance of the sliding door including the application of lubricants. In my view, he spoke of nothing more than his belief in this regard. Having said that, I do not see sufficient evidential basis to conclude that the accident was in fact caused by any defect in the sliding door.
6. In conclusion, I am satisfied that liability is established.

**CONTRIBUTORY NEGLIGENCE**

1. One may say Ali was not as careful as he could have been. Yet he was not reasonably expected to figure out the safe or proper way to open the door in the first place or to perceive the risk of the way he opened the door at the material time. Ali did nothing so out of the ordinary that blame should be attributable to him for causing the accident. I find no contributory negligence.

**QUANTUM**

**Injuries and treatment**

1. Ali was taken to the hospital. The diagnosis was crush injury to the left middle finger. There was a 1.5 cm laceration over the distal pulp region of the finger. X-ray showed crack fracture of the distal phalanx. Suturing and irrigation were performed. He was discharged with antibiotics and followed up by the orthopaedic and traumatology fracture clinic. He had 32 sessions of occupational therapy. He received sick leave until July 2006 (a total of 9 months).

**Medical expert opinion**

1. In August 2007, Ali was examined by Dr Lee Po Chin and Dr Patrick Wong, the orthopaedic experts engaged on behalf of him and Yau Lee respectively. This led to the experts’ joint report in September 2007.
2. Ali is right hand dominant. According to the report, Ali essentially complained about pain in the tip of his left finger on touch. He could not use a drill or carry weight heavier than 5 to 10 kg. He had difficulty in using a hammer with his left hand.
3. Physical examination showed an oblique scar at the tip of his injured finger with tenderness at tip. Range of movement was full and sensation was normal. Grip strength was slightly weakened on the left side with slight pain during power grip. X-ray showed the deformity at the distal phalanx with cleft in the middle terminal producing a bifid terminal tuff of the distal phalanx.
4. The experts agreed that the treatment provided by the hospital was appropriate. Ali’s injury had reached maximal medical improvement. His permanent impairment would be between 1% to 2% of the whole person. Dr Lee opined that Ali suffered pain since the tender area corresponded with the fracture site. Dr Wong did not rule out the presence of pain but observed no decrease in the left forearm girth and thus suggesting that Ali could use his left hand as often as his right.
5. Dr Lee opined that Ali was able to resume construction site work using well-padded gloves. There could be discomfort at the tip of his finger which would affect his work efficiency. He could also work as a security guard or building materials salesman. Dr Wong’s opinion in this respect did not differ much from Dr Lee. He believed the reduction in work efficiency in Ali’s case should be minimal. Both agreed that the sick leave granted was appropriate. The experts noted the loss of earning capacity assessed by the Employees’ Compensation Ordinary Assessment Board in 2006 was 1% which was maintained after review.

**After sick leave**

1. Ali resumed working for Yau Lee after his sick leave. He left such employment in mid-August 2006 (i.e. about 1.5 months afterwards). He then worked as a security guard until March 2007. In April 2007, he returned to Pakistan to get married and returned to Hong Kong only in January 2008. Since his return to Hong Kong, he has been taking up odd jobs at construction sites and as security guard. At the time of this trial, Ali was still working as a security guard.

**Pain, suffering and loss of amenities**

1. HK$200, 000 is claimed. In her submissions, Miss Pinto for Ali suggested an award in the range of HK$150,000 to HK$200,000. In support, she referred to these cases: *Chow Kai Kit v International Paper Manufacturing & Distribution Limited & Ors*, DCPI 1415/2006, 3 December 2007; *Chan Ming Yat v Youth Eng Lai Michael t/a Prime Industrial Co*, DCPI 201/2003, 5 June 2004.
2. Miss Lau for Yau Lee referred to these cases: *Wong Yin Wa v Chan Shing*, HCPI 1125/2000, Master Yuen, 31 January 2002; *Chan Ming Yat* (above); *Ng Tat Ping v Cho Shui Leung trading as Fu Keung Engineer Company*, HCPI 646/2000, Master Yuen, 13 June 2001; *Ho Shu Yau v Lo Siu Ling formerly t/s Chi Wo Engineering Company*, HCPI 1336/2000, Master Yuen, 31 January 2002. Some of these cases were also considered in *Chow Kai Kit* that Miss Pinto cited. Miss Lau suggested an award of HK$80,000.
3. Taking into account factors including the personal circumstances of Ali, the injury (including the fact that this was not injury to his preferred hand) and treatment, the period of recovery, the pain involved, the residual permanent impairment and its impact on his life and amenities, I come to the view that an award of HK$120,000 is appropriate.

**Loss of earnings**

1. Parties agree that Ali’s average monthly income over the 6 months when he worked for Yau Lee before the accident was HK$8,411.83. In view of the medical experts’ opinion that the 9 months of sick leave until July 2006 was appropriate, I find that Ali has suffered total loss of income for the 9 months.
2. It is claimed that but for the accident, Ali could have earned HK$9,000 per month now. It is therefore suggested that the multiplicand for calculating the pre-trial loss of earnings should be the median between HK$8,411.83 and HK$9,000. I disagree.
3. The wage records of 2 workers at Yau Lee for the period between May and October 2005 were referred to. Their average monthly income during this period were respectively HK$8,724 and HK$7,492. The wage records of one of them and another worker for the period between December 2007 and June 2008 were also referred to. Their average monthly income during this period were respectively HK$8,866 and HK$9,017.
4. It is the burden of Ali to prove that he somehow would have earned more than his pre-accident income during his 9 months’ sick leave. I am also not satisfied that the burden has been discharged by making assumption on the basis of these other workers’ pay during those periods.
5. I adopt the pre-accident average monthly income as the multiplicand. The loss, inclusive of mandatory provident fund benefits, during the sick leave period was HK$8,411.83 x 1.05 x 9 months = HK$79,491.79.
6. Ali resumed working for Yau Lee after the sick leave until he left in August 2006. No loss of income is claimed for this period. Ali left Yau Lee for the job as a security guard for one Indian Security Services Ltd. I mentioned above what he had done afterwards. As to the loss of income allegedly suffered since he left Yau Lee, Miss Lau raised essentially the issue of causation.
7. According to Ali, Yau Lee’s boss, Ah Fai, did not treat him well verbally after he resumed work. Whether this was true or not, there is no evidence that Yau Lee dismissed him. Yau Lee’s case was that Ali just left without any notice.
8. The real question is whether Ali in fact managed his work after the sick leave. There is no evidence that during the 1.5 months of work for Yau Lee after the sick leave, Ali had to take any sick leave either for rest or medical consultation due to his condition. He was even able to work overtime and to earn overtime pay. His duties were similar to those he used to carry out before the accident. These were basically in line with the medical expert opinion on Ali’s ability to resume his pre-accident work. In particular, the reduction in work efficiency should be mild.
9. I do not believe that Ali left for the security job because of his inability to handle his pre-accident work. Ali had in fact worked for the same security company before in 2005 through the introduction of friend. There was some kind of understanding that whenever the company needed his service, they would call him. This happened in August 2006 when Ali left Yau Lee for such job again.
10. Miss Lau submitted that the circumstances and evidence suggest that Ali left Yau Lee in August 2006 out of his own accord. What he did (including change of job and return to Pakistan) and what he did not do thereafter had nothing to do with the accident and his injury. Notwithstanding his alleged difficulty in taking up construction works, he did take up causal works in construction sites even after his return from the long stay in Pakistan. On the evidence, I agree with Miss Lau.
11. In the circumstances, I agree with Miss Lau that the claim for loss of earnings after the sick leave and in the future fails.

**Loss of earning capacity**

1. Loss of earning capacity is claimed. Miss Pinto made no specific mention of this item of claim in her submissions. In any event, I am not satisfied that the alleged handicap in the labour market is proved, in view of the medical expert evidence and the evidence of what Ali did since the end of his sick leave mentioned above.

**Miscellaneous special damages**

1. The amount of HK$4,440 claimed is not really disputed. I am also satisfied that this should be allowed as being reasonable.

**Summary**

1. The awards in respect of the above heads of claim are summarised as follows:

PSLA HK$120,000.00

Loss of earnings (with MPF) HK$ 79,491.79

Miscellaneous special damages HK$ 4,440.00

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Total: HK$203,931.79

1. Credit has to be given to employees’ compensation in the sum of HK$68,169.61. The award net of such sum will be HK$135,762.18.
2. There will be interest on damages for PSLA from the date of writ to today at 2% per annum and on special damages from the date of accident to today at half judgment rate. Interest from today until full payment will run at the judgment rate.

**ORDER**

1. I give judgment for Ali against Yau Lee for the sum of HK$135,762.18. Interest as aforesaid. I give a nisi order that Yau Lee shall pay Ali’s costs of the action to be taxed, if not agreed. For the avoidance of doubt, I certify the engagement of counsel. Unless an appointment is made within 14 days to argue costs, this costs nisi order shall become absolute.

Simon Leung

District Judge

Miss Josephine Pinto instructed by Messrs Lo, Wong & Tsui for the Plaintiff, assigned by the Director of Legal Aid

Miss Julia Lau instructed by Messrs Tsang, Chan & Wong for the Defendant